RECORD AND BRIEFS

No. 16-32

Supreme Court, U.S.
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In The
Supreme Court of the United States

KINDRED NURSING CENTERS LIMITED PARTNERSHIP d/b/a WINCHESTER CENTRE FOR HEALTH AND REHABILITATION n/k/a FOUNTAIN CIRCLE HEALTH AND REHABILITATION; KINDRED NURSING CENTERS EAST, LLC; KINDRED HOSPITALS LIMITED PARTNERSHIP; KINDRED HEALTHCARE, INC.; KINDRED HEALTHCARE OPERATING, INC.; KINDRED REHAB SERVICES, INC. d/b/a PEOPLEFIRST REHABILITATION,

Petitioners,

v.

JANIS E. CLARK, Executrix of the Estate of OLIVE G. CLARK, deceased, and on behalf of the wrongful death beneficiaries of OLIVE G. CLARK; and BEVERLY WELLNER, Individually and on behalf of the Estate of JOE P. WELLNER, deceased, and on behalf of the Wrongful Death Beneficiaries of JOE P. WELLNER,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Kentucky

BRIEF *AMICUS CURIAE* FOR GENESIS HEALTHCARE, INC., DIVERSICARE HEALTHCARE SERVICES, INC., GGNSC LOUISVILLE MT. HOLLY LLC D/B/A GOLDEN LIVINGCENTER – MT. HOLLY, BROOKDALE SENIOR LIVING INC., SIGNATURE HEALTHCARE, LLC, HCR MANORCARE AND KENTUCKY PARTNERS MANAGEMENT, LLC IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

Whether the FAA preempts a state-law contract rule that singles out arbitration by requiring a power of attorney to expressly refer to arbitration agreements before the attorney-in-fact can bind her principal to an arbitration agreement.

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AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.2, Genesis Healthcare, Inc., Diversicare Healthcare Services, Inc., GGNSC Louisville Mt. Holly LLC d/b/a Golden LivingCenter – Mt. Holly, Brookdale Senior Living Inc., Signature HealthCARE, LLC, HCR ManorCare and Kentucky Partners Management, LLC, respectfully submit this *Amicus Curiae* brief in support of Petitioners.[1]

IDENTITY AND INTERESTS OF THE *AMICI*

Amicus curiae Genesis Healthcare, Inc. is a holding company with subsidiaries that, on a combined basis, comprise one of the nation's largest post-acute care providers with more than 500 skilled nursing centers and senior living communities in 34 states nationwide. Genesis subsidiaries also supply rehabilitation therapy to more than 1600 locations in 46 states and the District of Columbia.

Amicus curiae Diversicare Healthcare Services, Inc., headquartered in Brentwood, Tennessee, employs

[1] Pursuant to Supreme Court Rule 37.2(a), notice of the *Amici*'s intent to file this brief was received by all counsel of record for all parties more than 10 days before the brief's due date. Petitioner and Respondent consented to filing. The undersigned affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *Amici*, their members, or their counsel, made a monetary contribution specifically for the preparation or submission of this brief.

6300 people offering wide-ranging, post-acute care in multiple settings, to include: complex medical, skilled nursing, short-term rehabilitative, long-term residency, memory assistance, respite and hospice care. Through a subsidiary, Diversicare operates 55 skilled nursing and long-term care facilities in nine Southern and Midwestern states.

Amicus curiae GGNSC Louisville Mt. Holly LLC d/b/a Golden LivingCenter – Mt. Holly is a member of a family of companies based in Plano, Texas. The Golden Living family of companies includes Golden LivingCenters, Aegis Therapies, AseraCare, and 360 Healthcare Staffing. There are 300 Golden LivingCenters in 21 states. Golden Living also offers assisted living services at more than 30 of its locations. Golden Living companies provide services to over 1000 nursing homes, hospitals, and other healthcare organizations in 40 states and the District of Columbia. The Golden Living family of companies has more than 40,000 employees who provide healthcare to over 60,000 patients daily.

Amicus curiae Brookdale Senior Living Inc., based in Brentwood, Tennessee, operates 647 senior care communities in 36 states, including 74 retirement centers, 440 assisted living communities and 41 continuing care retirement centers. Brookdale communities have the ability to serve approximately 66,000 residents daily.

Amicus curiae Signature HealthCARE, LLC, is a Kentucky based long-term health care and rehabilitation company with 143 different facility locations (46 of them in Kentucky) that span across 11 different states, providing jobs to nearly 24,000 employees. A growing number of Signature centers are earning five-star ratings from the Centers for Medicare & Medicaid Services. Signature was named "Best Places to Work in KY" in 2014 and 2015 by the Kentucky Chamber of Commerce, and was nationally awarded by Modern Healthcare in 2013 and 2015.

Amicus curiae HCR ManorCare is a leading provider of short-term, post-hospital services and long-term care with a network of more than 500 skilled nursing and rehabilitation centers, memory care communities, assisted living facilities, outpatient rehabilitation clinics, and hospice and home health care agencies. Based in Toledo, Ohio, ManorCare employs more than 50,000 caregivers nationwide.

Amicus curiae Kentucky Partners Management, LLC, based in Plano, Texas, manages 21 skilled nursing facilities in the Commonwealth of Kentucky, which includes 1762 nursing beds. Services offered at these nursing facilities include skilled nursing, short-term rehabilitative, long-term residency, and hospice care.

Predispute arbitration agreements represent efficient, cost-effective alternatives to traditional civil litigation, vital to *Amici* and the entire long-term care industry. Arbitration agreements aid cost reduction, retaining more resources for resident care and claim

resolution. *Amici* typically present residents with arbitration agreements upon admission. Some are standalone agreements; some form part of the admissions agreement. *Amici* enter into thousands of arbitration agreements every year, many executed by an attorney-in-fact for the resident, as in the *Whisman* cases. Because of their genuine interest in promoting consistent enforcement of valid arbitration agreements, *Amici* strongly encourage the Court to grant the Petition.

STATEMENT

Venue should play no part in substantive law, but it means everything in Kentucky after *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306 (Ky. 2016).[2]

Justice Story long ago premonished the Court's need to review *Whisman*:

> Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the constitution itself: If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might . . . never

[2] *See* Petition at pp. 17-20. *Every* Kentucky federal district court to consider *Whisman*'s rule has held *Whisman* violates the FAA. Kentucky state courts are bound by Court Rule to follow *Whisman*. *See* Rules of Kentucky Supreme Court 1.030(8) and 1.040(5).

> have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable[.]

Martin v. Hunter's Lessee, 1 Wheat 304, 348, 14 U.S. 304, 348, 4 L. Ed. 97 (1816).

Whisman creates precisely the "deplorable" state envisioned: Kentucky parties to arbitration agreements must "race to the courthouse": to avoid enforcement of an arbitration agreement, Kentucky state courthouses. Kentucky's federal district courts provide the alternative for those hoping to enforce arbitration contracts. Unfortunately, Kentucky citizens lacking diversity to remove or file an original federal action often lose their right to enforce valid arbitration contracts.

Amici adopt and rely upon the facts as Petitioners set forth in their brief, and here provide only a summary of pertinent facts. *Whisman* arose from a long-term care facility's attempt to enforce arbitration agreements executed between it and its residents' agents in Kentucky state courts.[3] Pet. App. 7a. The residents' powers of attorney documents ("POAs") designated the agents and their specific grants of power. *See* Pet. App. 12a-23a. Each POA granted the power to make and execute contracts, specifically and without

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[3] All arbitration agreements considered in *Whisman* were optional and not a condition of admission. Pet. App. 17a.

limitation. Pet. App. 19a; 22a.[4],[5] In both cases addressed in the Petition, *Whisman* held these powers to be insufficient for the attorney-in-fact to enter into, or enforce, an *arbitration* contract, specifically. Pet. App. 50a. The Supreme Court of Kentucky refused to enforce the agent-entered predispute arbitration contracts for reasons not applicable to any other contracts under Kentucky law, reasoning that arbitration contracts waived a "God-given right" to a jury trial and such waiver could not be inferred from a "less than explicit grant" of the power to execute contracts in general. Pet. App. 40a; 43a.

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[4] Olive Clark's "General Durable Power of Attorney to Conduct All Business and Personal Affairs of Principal" granted her attorney-in-fact, "with full power for me and in my name . . . in her sole discretion" to "transact, handle, and dispose of all matters affecting me and/or my estate in any possible way." Pet. App. 18a. Her POA granted powers to "draw, make and sign in my name any and all checks, promissory notes, *contracts*, deeds or *agreements*." Pet. App. 19a (emphasis added). Her POA granted authority to "institute or defend suits concerning my property or rights," and "Generally to do and perform for me and in my name all that I might do if present." Pet. App. 19a.

[5] Joe Wellner's Power of Attorney document granted his attorney-in-fact powers to "make, execute and deliver deeds, releases, conveyances and *contracts of every nature* in relation to both real and personal property, including stocks, bonds and insurance." Pet App. 22a (emphasis added). His POA contained additional grants to "demand, sue for, collect, recover and receive all debts, monies, interest and demands whatsoever now due or that may hereafter be or become due to me (including the right to institute legal proceedings therefor)." Pet. App. 21a.

SUMMARY OF THE ARGUMENT

Amici request this Court's review because *Whisman* so disproportionately burdens long-term care providers given the industry's regular use of agent-executed predispute arbitration agreements. A significant number of long-term care residents, because of age or infirmity, utilize powers of attorney designating individuals authorized to conduct their business and personal affairs, including the right to enter into all types of contracts for their resident. The Federal Arbitration Act ("FAA") says arbitration contracts must be enforced like all other contracts. *Whisman* elevates the standard for enforcement of agent-executed arbitration contracts beyond that required for enforcement of any other agent-executed contract. *Whisman*'s standard exacerbates the progressively inordinate hardships borne predominately by long-term care entities seeking enforcement of their federal arbitration rights.

Whisman refused to acknowledge that courts and legislatures can set higher standards for a multitude of rights, including constitutionally protected rights, because no federal law prohibits those elevated standards. On the contrary, the FAA does prohibit higher standards for arbitration contracts as opposed to other contracts.

Whisman grounded its holding on the erroneous premise that a party waives his/her fundamental "right to jury trial," provided by the Seventh Amendment and Section 7 of the Kentucky Constitution, by

signing a predispute arbitration agreement. The Seventh Amendment protects and preserves, but does not confer, a "right" to jury trial. Having executed predispute arbitration agreements to resolve their claims in a non-judicial forum prior to any claim having arisen, the "right" to jury trial was never implicated in the *Whisman* cases. The very basis of *Whisman*'s holding is incorrect.

Whisman by state action violates long-term care providers' constitutional right to enter into contracts as guaranteed by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. Kentucky's highest court singles out the long-term care industry in *Whisman*, targeting its reasoning to "nursing homes" in violation of the Fourteenth Amendment's Equal Protection Clause. *See* Pet. App. 43a; 44a; 46a. The long-term care industry should not be singled out as required to divert valuable resources to litigation unnecessarily.

Whisman's result-oriented reasoning finds no credible basis in this Court's precedent. By excepting agent-executed arbitration contracts as "different" from all other agent-executed contracts and requiring a higher standard for their enforcement, *Whisman* rejects this Court's precedent that arbitration contracts must be enforced on "equal footing" with other contracts. Kentucky attempted to disguise its discriminatory reasoning as neutral agency law, relying on a "God-given right" to a jury trial. *Whisman* all but taunts this Court's precedent. Absent review, *Whisman* bestows a convoluted loophole for skirting the FAA.

Amici request this Court grant review and reverse *Whisman*.

ARGUMENT IN SUPPORT OF THE PETITION

The Supremacy Clause forbids state courts from dissociating themselves from federal law they do not like. *Cf., DirecTV, Inc. v. Imburgia*, 577 U.S. ___, 136 S. Ct. 463, 468, 193 L. Ed. 2d 365 (2015). "[T]he Judges of every State shall be bound" by "the Laws of the United States." U.S. Constitution, Art. VI, cl.2. Undaunted, the Supreme Court of Kentucky "rejected the notion" that its tortured holding conflicted with this Court's decisions in *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201, 182 L. Ed. 2d 42 (2012), and *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011), on grounds that "our holding does not prohibit arbitration of any 'particular type of claim.'" Pet App. 46a.

The Petition demonstrates convincingly that *Whisman*'s decision overtly violates the FAA and conflicts with this Court's arbitration precedents and numerous federal district courts' holdings that an agent's "power to contract" provides authority to contract *for arbitration*. *Whisman* all but proclaims the Kentucky court's judicial hostility towards arbitration, moving district Judge Stivers of the Western District of Kentucky to comment:

> Applying *Whisman* to invalidate the arbitration agreement signed by Decedent's husband

> would run afoul of the FAA. Although the Kentucky Supreme Court's antipathy for arbitration was more subtly expressed in its earlier decision in *Ping* [*v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012)], its true colors were revealed fully in *Whisman*. . . . [T]he rule expressed in *Whisman* contravenes the FAA[.]

Preferred Care of Delaware, Inc. v. Hopkins, 2016 WL 3546407 (W.D. Ky., June 23, 2016).

Whisman particularly flaunted its animus of arbitration contracts used in long-term care settings. *Whisman*'s aftermath leaves a significant jurisprudential divide between Kentucky's state and federal trial courts. *Amici* support Petitioners' arguments explaining why *Whisman* violates the FAA and federal substantive arbitration law. *Amici* write separately to provide additional reasons in support of the Petition.

I. FOR ARBITRATION CONTRACTS, *WHISMAN* APPLIED DIFFERENT RULES AND DEMANDED SPECIFICITY FOR ENFORCEMENT NOT REQUIRED FOR OTHER CONTRACTS

Whisman continues state courts' campaign to find nuanced, state-law "loopholes" to avoid arbitration enforcement in long-term care settings. Arbitration concerns the forum only, not the claim or the damages recoverable. Yet *Whisman* unapologetically champions a preference for judicial trials over arbitration, disfavoring arbitration and violating this Court's precedent.

See Pet. App. 89a (Abramson, J., dissenting). *Cf., Concepcion*, 63 U.S. 333, 131 S. Ct. 1740, 179 L. Ed. 2d 742.

A significant number of long-term care residents, because of age or infirmity, utilize powers of attorney designating individuals to conduct their business and personal affairs, often including the right to enter into all types of contracts for the resident. *Whisman* elevates the standard for enforcing agent-executed *arbitration* contracts above the standard required for all other agent-executed contracts. *Amici* and long-term care industry members need this Court to act. The Court has long-recognized that reliance on well-settled law is an important legal principal and business condition. *Whisman*'s decision overtly conflicts and even disregards this Court's arbitration precedents. As the Petition shows, Kentucky's federal district courts unanimously find *Whisman* violates the FAA. *See* Petition, pp. 17-23. Absent review, the long-term care industry can count on inconsistent enforcement, at best.

II. *WHISMAN* IGNORES THE FAA'S PROHIBITION AGAINST ELEVATED STANDARDS FOR ARBITRATION CONTRACTS

Highlighting the *Whisman* court's error is its refusal to acknowledge that courts and legislatures can indeed set higher standards for parental rights, slavery and marriage, to name a few of *Whisman*'s "comparisons," because no federal law prohibits those elevated standards. *See, e.g.*, Pet. App. 42a; *see also* KRS § 625.090; KENTUCKY CONST. § 25; and KRS

§ 402.050. *Whisman* ignores that the FAA does prohibit higher standards for arbitration contracts as compared to other contracts. This fact renders meaningless *Whisman*'s comparison to waivers of other fundamental rights. *See, e.g.*, Pet. App. 97a (Abramson, J., dissenting). Notwithstanding its dislike for the federal mandate, "redefining" or "elevating" the standard for enforcing agent-executed arbitration contracts is simply preempted by the FAA and this Court's substantive arbitration precedent.

III. *WHISMAN* INCORRECTLY BASED ITS HOLDING ON A "GOD-GIVEN RIGHT" TO JURY TRIAL: NO SUCH "RIGHT" EXISTS OR WAS EVER IMPLICATED

Whisman grounded its decision on the erroneous premise that its agents waived their residents' "God-given right" to jury trial under the Seventh Amendment and Section 7 of the Kentucky Constitution by signing arbitration agreements. Pet. App. 43a. In fact, no jury waiver occurred because no jury "right" ever existed with respect to those claims.

Obviously, a jury trial is absolutely not a "God-given right," but rather a right provided under the terms and conditions of a constitution written and adopted by its people. It is alienable. In fact, one can easily waive one's right to jury trial simply by not asking for it. *See* Fed. R. Civ. P. 38(d); Kentucky Rule Civ. P. 38.04. *See also Brown v. Hoblitzell*, 307 S.W.2d 739

(Ky. 1956). Waivers by omission do not violate the Constitution. *See Rutledge v. Electric Hose & Rubber Co.*, 511 F.2d 668, 674 (9th Cir. 1975) (citing 5 MOORE'S FEDERAL PRACTICE 38.08, p. 83, n. 68). This Court stated:

> No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.

Yakus v. United States, 321 U.S. 414, 444, 64 S. Ct. 660, 677, 88 L. Ed. 834 (1944). It follows that a "waiver" by affirmatively entering into a contract does not violate the Constitution. The *Whisman* decision is not supported by the laws of this Court.

The Seventh Amendment provides that jury trials in suits at common law are "preserved." Neither the Seventh Amendment nor Section 7 of the Kentucky Constitution creates a jury trial right. Both, by their terms, simply "preserve" that right as it already existed at common law. *See Atlas Roofing Co., Inc. v. Occupational Safety, Etc.*, 430 U.S. 442, 97 S. Ct. 1261, 51 L. Ed. 2d 464 (1977). *See also Kentucky Comm'n on Human Rights v. Fraser*, 625 S.W.2d 852, 854 (Ky. 1981).

Following the analysis in *Granfinanciera v. Nordberg*, 492 U.S. 33, 109 S. Ct. 2782, 106 L. Ed. 2d 26 (1989), in situations where Congress assigned resolution of the relevant claim to a non-Article III adjudicative body that does not use a jury as a fact finder, there

is no right to a jury trial. *Id.* at 54, 109 S. Ct. at 2796. The Seventh Amendment does not confer the right to a jury trial, only the right to have a jury hear the case once it is determined that the litigation should proceed before a court. If claims are properly before an arbitral forum pursuant to an arbitration agreement, the jury trial right vanishes. *See Cremin v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 957 F. Supp. 1460, 1471 (N.D. Ill. 1997).

The right to a trial by jury is necessarily incident to, and predicated upon, the right to a judicial forum. *See, e.g.*, *Marsh v. First USA Bank, N.A.*, 103 F. Supp. 2d 909, 921-22 (N.D. Tex. 2000). Consequently, the "right" to a jury trial, under either the Seventh Amendment or Section 7 of Kentucky's Constitution, is not implicated by a contractual provision that precludes access to a judicial forum. *Id.* at 921-22 (citing *Geldermann Inc. v. Commodity Futures Trading Comm.*, 836 F.2d 310, 323 (7th Cir. 1987); *Illyes v. John Nuveen & Co., Inc.*, 949 F. Supp. 580, 584 (N.D. Ill. 1996). *See also Nat'l Iranian Oil Co. v. Ashland Oil, Inc.*, 716 F. Supp. 268, 270 (S.D. Miss. 1989). "The 'loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate.'" *Sydnor v. Conseco Fin. Servicing Corp.*, 252 F.3d 302, 307 (4th Cir. 2001) (quoting *Pierson v. Dean, Witter, Reynolds, Inc.*, 742 F.2d 334, 339 (7th Cir. 1984)).

No claims against the nursing home had yet arisen in any court at the time Ms. Clark's and Mr. Wellner's agents executed the arbitration contracts. Pet. App. 32a ("An arbitration agreement signed *before*

a cause of action exists cannot be 'reasonably necessary' to the resolution of that cause.") (Emphasis added). The *Whisman* court failed to comprehend the truth of its errant analysis: no "right" to jury trial exists *until* it is determined that litigation should proceed before a court. Having executed *predispute* arbitration contracts before a claim arose, neither the Seventh Amendment nor Section 7 of the Kentucky Constitution was ever implicated.

IV. *WHISMAN*'S APPLICATION TO VALID ARBITRATION AGREEMENTS VIOLATES FUNDAMENTAL CONSTITUTIONAL RIGHTS

The Kentucky court, by state action in *Whisman*, violated the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the long-term care provider's attendant rights thereunder by impairing its fundamental right to enter into contracts with agents acting under powers of attorney, and unfairly discriminating against enforcement of the long-term care provider's arbitration contracts with its residents.

A "state law that 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' is preempted by the Supremacy Clause." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941). As federal substantive law, the FAA preempts all contrary or inconsistent state law. *See Concepcion*, 563 U.S. 333. The *Whisman* Court agreed the FAA governed the arbitration agreement at

issue. Pet. App. 24a. As Justice Thurgood Marshall explained:

> A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of §2. . . . A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law. Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot.

Perry v. Thomas, 482 U.S. 483, 492 n. 9, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967) and *Southland Corp. v. Keating*, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984) (emphasis original). Regardless, the *Whisman* court likely invalidated countless arbitration contracts signed by agents under powers-of-attorney without even considering those ramifications because it so detests the agreements in the nursing home context.

A. *Whisman* Violates the Due Process Clause of the Fourteenth Amendment by Impairing the Fundamental Federal Right to Contract.

The Due Process Clause of the Fourteenth Amendment provides and protects the fundamental right to enter into contracts, which includes entering contracts with agents acting under powers of attorney. *Whisman*'s application violates the Due Process Clause by impairing long-term care providers', including *Amici*'s, federal common law right to enter into contracts.[6]

The Supreme Court of Kentucky itself previously acknowledged, "[t]he term 'due process' has two meanings in American jurisprudence: (1) substantive due process, which is based on the idea that some rights are so fundamental that the government must have an exceedingly important reason to regulate them, if at all, such as the right to free speech or to vote; and (2) procedural due process, which requires the government to follow known and established procedures, and not to act arbitrarily or unfairly in regulating life, liberty or property." *Miller v. Johnson Controls, Inc.*, 296 S.W.3d 392, 397 (Ky. 2009). In *Shelley v. Kraemer*, 334 U.S. 1, 14, 68 S. Ct. 836, 92 L. Ed. 1161 (1948), this Court explained "[t]hat the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the

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[6] It is well established that a corporation is a "person" within the meaning of the due process of law and equal protection clauses of the Fourteenth Amendment. *See Grosjean v. Am. Press Co.*, 297 U.S. 233, 244, 56 S. Ct. 444, 447, 80 L. Ed. 660 (1936).

Fourteenth Amendment, is a proposition which has long been established by decisions of this Court." *See also Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 619 (Ky. 2014) (citing *Shelley* for the proposition that decisions of both legislature and judiciary are considered state actions).

The Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. *See Washington v. Glucksberg*, 521 U.S. 702, 720-21, 117 S. Ct. 2258, 2268, 138 L. Ed. 2d 772 (1997). This Court long ago recognized that the general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. *Allgeyer v. Louisiana*, 165 U.S. 578, 17 S. Ct. 427, 41 L. Ed. 832 (1897); *see also Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905) (*overruled on other grounds*, *Ferguson v. Skrupa*, 372 U.S. 726, 83 S. Ct. 1028, 10 L. Ed. 2d 93 (1963)).

The Fourteenth Amendment "forbids the government to infringe . . . 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302, 113 S. Ct. 1439, 1447, 123 L. Ed. 2d 1 (1993). The right to contract is a long-recognized liberty interest. The "Fourteenth Amendment liberty includes the right . . .

to enter into all contracts which may be proper, necessary and essential" to a citizen's needs. *See EJS Properties, LLC v. City of Toledo*, 698 F.3d 845, 859 (6th Cir. 2012) (citing *Glucksberg*, 521 U.S. at 760) (internal quotation marks omitted).

By requiring a specific grant of authority solely for enforcement of an arbitration contract, versus other contracts, *Whisman* flagrantly infringes on a long-term care provider's right to enter into an arbitration contract with an agent empowered to make all contracts on her principal's behalf. *Whisman* places agent-executed arbitration contracts into a special category with a different standard for enforcement, directly violating the FAA, and its application impairs *Amici*'s fundamental right to contract. Application of the *Whisman* Court's rule of law virtually eliminates *Amici*'s right to enter into arbitration contracts freely with their residents' agents – who otherwise hold the unqualified power to execute "any and all contracts" – violating *Amici*'s Fourteenth Amendment substantive due process right to make and enter into contracts.

B. *Whisman* Violates the Equal Protection Clause of the Fourteenth Amendment by Refusing to Treat Long-Term Care Providers Similarly

Kentucky Courts are willing to enforce some arbitration contracts, but apparently not all. In *Schnuerle v. Insight Communications Co., L.P.*, 376 S.W.3d 561 (Ky. 2012), the court held that "arbitration is a favored

method of dispute resolution. 'Arbitration has always been favored by the courts.' *Poggel v. Louisville Ry. Co.*, 225 Ky. 784, 10 S.W.2d 305, 310 (1928). 'Kentucky law favors the enforcement of arbitration agreements.' *Medcom Contracting Services, Inc. v. Shepherdsville Christian Church Disciples of Christ*, 290 S.W.3d 681, 685 (Ky. App. 2009) (citing *Kodak Mining Co. v. Carrs Fork Corp.*, 669 S.W.2d 917 (Ky. 1984)); *see also Ally Cat, LLC v. Chauvin*, 274 S.W.3d 451, 457 (Ky. 2009)." But, in refusing to honor agent-executed arbitration contracts involving long-term care facilities, the *Whisman* court brazenly singled out the long-term care industry in its holding. *See* Pet. App. 46a ("Nursing home facilities may still enforce arbitration agreements with their residents when the resident has signed the agreement or validly authorized his agent to sign in his stead."). *See also* Pet. App. 43a ("A durable power-of-attorney document often exists long before a relationship with a nursing home is anticipated."); and Pet. App. 44a ("It makes no difference that arbitration clauses are commonplace in nursing home contracts and that a principal might anticipate that someday his agent will act to admit him into one.").

Long-term care providers are entitled to the same equal protection as any contract signator. The Fourteenth Amendment commands persons who are similarly situated must be treated alike. *See City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985). Likewise, the Supreme Court of Kentucky affirmed in *Vision Mining, Inc. v. Gardner*, 364 S.W.3d 455, 465 (Ky.

2011), "[c]itizens of Kentucky enjoy equal protection of the law under the 14th Amendment of the United States Constitution and Sections 1, 2, and 3 of the Kentucky Constitution" (citing *D.F. v. Codell*, 127 S.W.3d 571, 575 (Ky. 2003)). *Whisman* does not even try to disguise its discrimination against enforcing agent-entered arbitration contracts utilized in long-term care settings.

Amici increasingly find their use of arbitration under siege. The New York Times recently campaigned against use of arbitration agreements in nursing home settings. *See* Editorial, *When People Sign Away Their Right to Sue*, N.Y. TIMES, July 25, 2016 at A22. The Supreme Court of Kentucky, however, should be fulfilling its duty to enforce the laws equally for all citizens, not favoring politically-trending views via unconstitutional decisions. In fact no rational basis or substantial and justifiable reasons exist for treating long-term care facilities differently from other industries that rely on arbitration agreements. *Whisman*'s distinction creates an arbitrary one between similarly situated individuals, and thus violates the equal protection guarantees of the Federal and State Constitutions. *Cf.*, *Gardner*, 364 S.W.3d at 474.

V. STATE COURT RESTRICTIONS ON ARBITRATION RIGHTS POSE A SUBSTANTIAL THREAT TO AN INCREASINGLY IMPORTANT INDUSTRY

The *Whisman* case virtually eliminates use of agent-executed, predispute arbitration agreements in the long-term care industry. Its holding poses a substantial threat to the long-term care industry at a time when demographic trends dictate that the provision of long-term care will become even more important in the near future. As the U.S. population ages, the long-term care industry will play an increasingly prominent role in providing health care to the nation's elderly.[7] Even as efforts to expand independent living options continue, it is undisputed that a strong long-term care industry is essential for the future well-being of the country's aging population.

In addition to undue litigation burdens hindering its ability to enforce its federal arbitration rights, the nation's long-term care industry faces a number of other challenges to threaten it, including economic, governmental, and regulatory pressures. For example,

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[7] The population age 65 and over has increased from 36.2 million in 2004 to 46.2 million in 2014 (a 28% increase) and is projected to more than double to 98 million in 2060. By 2040, there will be about 82.3 million older persons, twice the number in 2000. People 65+ represented 14.5% of the population in the year 2014 but are expected to grow to 21.7% of the population by 2040. The 85+ population is projected to triple from 6.2 million in 2014 to 14.6 million in 2040. *See* U.S. Dep't of Health & Human Servs., Admin, on Aging, *Aging Statistics*, http://www.aoa.gov/aoaroot/aging_statistics/index.aspx (updated through 2015).

in 2011, the Centers for Medicare & Medicaid Services implemented a rule cutting payments to skilled nursing facilities in the 2012 fiscal year by 11.1 percent, affecting provider reimbursement for post-acute care for seniors who have been hospitalized and require rehabilitative services before returning to their homes.[8] Moreover, skilled nursing facilities are facing a cumulative Medicare funding reduction worth $65 billion over the next ten years.[9]

Efficient dispute resolution in long-term care settings should be encouraged, not discouraged as in *Whisman*. The long-term care industry is often unable to seek legislative protection against this onslaught in states like Kentucky, Illinois, Arkansas, and Georgia, where state constitutional doctrines are used to defeat efforts of all tort reform legislation. *See Bayer CropScience LP v. Schafer*, 2011 Ark. 518, 385 S.W.3d 822 (Ark. 2011); *Lebron v. Gottlieb Mem'l Hosp.*, 930 N.E.2d 895, 914 (Ill. 2010); *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218, 220 (Ga. 2010); *Williams v. Wilson*, 972 S.W.2d 260, 267 (Ky. 1998).

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[8] Philip Moeller, *Nursing Homes Squeezed by Medicare Cuts*, U.S. News Money (Aug. 8, 2011), http://money.usnews.com/money/blogs/the-best-life/2011/08/08/nursing-homes-squeezed-by-medicare-cuts.

[9] *$65 billion in Medicare cuts to rock U.S. nursing homes over 10 years, analysis shows*, McKnight's Long-Term Care News (Aug. 2, 2012), http://www.mcknights.com/65-billion-in-medicare-cuts-to-rock-us-nursing-homes-over-10-years-analysis-shows/article/253036.

The long-term care industry can contract to arbitrate personal injury claims, just like any others. *Amici* join the Petitioners in asking this Court to grant review.

CONCLUSION

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted and the judgment below reversed. *Whisman* is enormously detrimental to the long-term care industry, particularly if its reasoning spreads beyond Kentucky to other states.

Respectfully submitted,

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